

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In re:	)	
	)	
NPCR, INC. d/b/a NEXTEL PARTNERS	)	CC Docket 96-45
	)	
Petition for Waiver of Sections 54.307(c) and	)	
54.314 of the Commission's Rules	)	

To: The Commission

**REPLY COMMENTS OF NEXTEL PARTNERS  
TO OPPOSITION OF CENTURYTEL**

NPCR, Inc. d/b/a Nextel Partners ("Nextel Partners"), by its undersigned attorneys, hereby submits its "Reply Comments" to the "Opposition" filed by CenturyTel, Inc. ("CenturyTel") on December 29, 2003 in the above-captioned proceeding. As set forth in greater detail below, CenturyTel's Opposition to Nextel Partners' Petition for Waiver is based on flawed assumptions and is completely unsupported by applicable law. Good cause exists for granting Nextel Partners' Petition, in spite of CenturyTel's arguments to the contrary, and Nextel Partners requests that the waivers be granted as promptly as possible so that Nextel Partners may receive Universal Service Fund ("USF") subsidies commencing on its date of designation in the State of Wisconsin.

**DISCUSSION**

**I. Nextel Partners Has Already Demonstrated That Good Cause Exists for Grant of its Waiver Requests**

Under Section 1.3 of the Commission's Rules, "[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown."<sup>1</sup> In the instant case, good cause for grant of the requested waivers exists. In

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<sup>1</sup> 47 C.F.R. § 1.3 (2003).

order to receive High Cost Program USF support commencing on September 30, 2003, the date Nextel Partners was designated as an Eligible Telecommunications Carrier (“ETC”), it would have been necessary under Section 54.314 of the Commission’s Rules for the State of Wisconsin to have submitted its certification to the FCC and the Universal Service Administrative Company (“USAC”) no later than April 1, 2003, approximately six months *before* Nextel Partners received its designation.<sup>2</sup> Moreover, pursuant to the requirements of Section 54.307(c) of the Rules, Nextel Partners would have had to file working loop data for HCL, LTS, LSS and ICLS no later than March 30, 2003, nearly a month *before* Nextel Partners had even filed its Petition for Designation with the state commission.<sup>3</sup> As a result, strict application of the deadlines for certification and line count submissions as set forth in Sections 54.314 and 54.307(c) of the Commission’s Rules would automatically deny Nextel Partners the right to receive USF support for the fourth quarter (and part of the third quarter) of 2003, despite its designation as an ETC and offering of USF supported services during that period. Therefore good cause exists for grant of the requested waivers and the Commission should grant the waivers pursuant to Section 1.3 of the Rules..

CenturyTel relies on *WAIT Radio v. FCC*, 418 F.2d 1153 (DC Cir. 1969), for the proposition that Nextel Partners must demonstrate both that it faces “special circumstances that justify a deviation from the general rule,” and that “such a deviation would serve the public interest.” CenturyTel misunderstands the *WAIT Radio* decision, which in fact establishes the principle that a waiver of a rule is appropriate in a particular case where application of the rule in that case does not serve the public interest goals

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<sup>2</sup> See Nextel Partners’ Petition for Waiver at 4-5.

underlying the rule. As the Court of Appeals explained, “a rule is more likely to be undercut if it does not in some way take into account considerations of hardship, equity or more effective implementation of overall policy.”<sup>4</sup> In the instant case the *Wait Radio* doctrine supports granting the requested waivers. Strict application of the rules for which waivers are being sought would not serve the public interest underlying the rules and would create undue hardship by denying a designated ETC the opportunity to receive USF support during the initial few months after its designation. The *WAIT Radio* principle is essentially codified in Section 1.925(b)(3)(i) of the Commission’s Rules, which allows an alternative path to grant of a waiver in addition to the “good cause” pathway established in Section 1.3 of the Rules.<sup>5</sup> Grant of the requested waivers is therefore appropriate under Section 1.925(b) of the Commission’s Rules. In any case, contrary to CenturyTel’s assertions, Nextel Partners already demonstrated in its Petition that, consistent with existing Commission legal precedent, special circumstances exist that warrant the waiver of Sections 54.307(c) and 54.314, and grant of the waivers is favored by the public interest.

**A. Nextel Partners Has Already Demonstrated The Existence of Special Circumstances Justifying Grant of the Requested Rule Waivers**

CenturyTel’s claims that Nextel Partners has failed to prove the existence of “special circumstances” justifying waivers of Sections 54.307(c) and 54.314 are unpersuasive. As Nextel Partners points out in its Petition for Waiver, the Commission has already determined that an ETC designation date is a “special circumstance” that

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<sup>3</sup> *See id.* at 3.

<sup>4</sup> *WAIT Radio*, 418 F.2d at 1159.

<sup>5</sup> Nextel Partners’ Petition sought relief under both Sections 1.3 and 1.925 of the Commission’s Rules. *See* Nextel Partners’ Petition for Waiver at 1.

warrants waiver of the strict application of Sections 54.307 and 54.314.<sup>6</sup> For example, in *RFB Cellular, Inc. Petitions for Waiver of Sections 54.314(d) and 54.307(c) of the Commission's Rules and Regulations*, 17 FCC Rcd 24387 (December 3, 2002) (“*RFB Cellular*”), the Commission made it clear that a new ETC’s inability to meet a certification filing deadline that preceded the carrier’s designation as an ETC, resulting in the potential loss of a calendar quarter of USF funding if the rule were applied strictly constitutes a “special circumstance” deserving of a waiver of the Commission’s Rules:

RFB Cellular has demonstrated that special circumstances warrant a deviation from the filing deadline provided in section 54.314(d) of the Commission’s rules. Because RFB did not receive its ETC designation until November 20, 2001, it could not have met, under any circumstances, the October 1, 2001 filing deadline for receiving support beginning in the first quarter of 2002.

\* \* \* \*

It would be onerous, however, to deny an ETC receipt of universal service support for an entire quarter, as a result of a particular ETC designation having occurred after the certification filing deadline. We therefore find that RFB has demonstrated special circumstances that justify a waiver of section 54.314. In this instance, these special circumstances outweigh any processing difficulties that USAC may face as a result of the late-filed certification.<sup>7</sup>

The operative rationale in *RFB Cellular* also applies in this proceeding. If Nextel Partners is unable to obtain the rule waivers it seeks, Nextel Partners will not receive subsidy payments for the provision of USF supported services for the entire fourth quarter of 2003, and part of the third quarter of 2003. Under applicable Commission

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<sup>6</sup> See *id.* at 8, and n.14.

<sup>7</sup> *RFB Cellular* at ¶ 8. The Commission also found in *RFB Cellular* that a similar analysis applied to the petitioner’s request for a waiver of line count filing deadlines pursuant to Section 54.307 of the Commission’s Rules. See *RFB Cellular* at ¶¶ 10-11.

precedent, such a situation constitutes a “special circumstance” deserving of a rule waiver.<sup>8</sup>

**B. Nextel Partners Has Already Shown That the Grant of its Waiver Requests Is In the Public Interest**

CenturyTel argues that it is not in the public interest to grant the requested waivers because “Nextel Partners is already successfully providing CMRS services in Wisconsin, and has been since at least 2001.”<sup>9</sup> CenturyTel goes on to note such statistics as the number of wireless customers served by Nextel Partners on a nationwide basis, and the nationwide revenues earned by Nextel Partners in the last 12 months. CenturyTel then concludes from these recitations that Nextel Partners has failed to demonstrate that “federal support for the September-December, 2003 period is essential to its continued success.”<sup>10</sup> Such assertions are completely misguided. The Commission has never required a petitioner for waiver of Sections 54.307(c) or 54.314 to demonstrate that it does not already provide service in the relevant jurisdiction, or that federal support during the waiver period is “essential to its continued success.”

Moreover, although it is true that Nextel Partners provided CMRS service in Wisconsin prior to the date it was designated an ETC, Nextel Partners did not provide all of the USF supported services prior to designation.<sup>11</sup> Nor was Nextel Partners obligated,

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<sup>8</sup> In light of the Commission’s well-developed case law on the topic, CenturyTel’s contention that Nextel Partners’ requests for waivers of Sections 54.314 and 54.307(c) of the Commission’s Rules cannot properly be considered in the context of a waiver proceeding, but are instead of the nature of rule changes that “it ought to seek through the rulemaking process” is both unsupported and unpersuasive.

<sup>9</sup> CenturyTel Opposition at 5-6.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> For example, Nextel Partners did not offer LifeLine, or Link-Up, two USF supported services that according to law must be offered by all ETCs, but cannot be

prior to its ETC designation, to provide USF supported services on the basis of a “reasonable request” from a potential customer anywhere in its designated territory in Wisconsin. These responsibilities, and many others specified by federal law, accrued only upon Nextel Partners’ designation as an ETC. Nextel Partners’ acceptance of these responsibilities in Wisconsin demonstrably benefits the public, and justifies waiver of the Commission’s Rules to the limited extent necessary to ensure that Nextel Partners’ offering of supported services is appropriately subsidized, preventing Nextel Partners from losing more than a calendar quarter of funding.

It is well-established that denying an entire calendar quarter of USF support to a newly-designated ETC simply because the timing of its designation precluded the timely filing of a necessary certification would violate the fundamental USF principle of competitive neutrality.<sup>12</sup> In such situations, the Commission has determined that the grant of waivers of Sections 54.314 and 54.307(c) of the Rules is in the public interest.<sup>13</sup> Despite CenturyTel’s assertions, it is not in the public interest to penalize Nextel Partners “as a result of the timing of its ETC designation.”<sup>14</sup>

## **II. Nextel Partners Need Not Demonstrate That the State of Wisconsin Is Willing to Issue An Annual Certification for the Waiver Period**

In its Petition for Waiver , Nextel Partners requested that the Commission:

waive the strict application of Section 54.314 of the Rules to treat the PSCW’s [*i.e.*, the Wisconsin PSC’s] October 1, 2003 annual certifications of Nextel Partners’ use of USF High Cost Program funds as timely filed

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offered by non-ETCs.

<sup>12</sup> See *RFB Cellular* at ¶ 9.

<sup>13</sup> See *id.* at ¶¶ 9-10.

<sup>14</sup> *Id.* at ¶ 9 and n.22.

for purposes of allowing Nextel Partners to begin receiving USF High Cost subsidies as of September 30, 2003.<sup>15</sup>

Despite this unambiguous phrasing in Nextel Partners' Petition, CenturyTel's Opposition nevertheless deliberately seeks to mischaracterize Nextel Partners' request by claiming that Nextel Partners is asking the Commission for permission to "allow the Wisconsin PSC to file an out of time certification."<sup>16</sup> Building on this false premise, CenturyTel derivatively contends that Nextel Partners is not entitled to obtain the requested waiver of Section 54.314 for the reason that the State of Wisconsin has not demonstrably agreed to file the amended certification Nextel Partners seeks. CenturyTel's arguments lack merit.

Nextel Partners is not requesting that the Commission "allow" the Wisconsin PSC to file another, back-dated annual certification, but rather that the annual certification *already filed* by the Wisconsin PSC on October 1, 2003 be deemed as timely filed to allow USF funding to commence at the end of the third quarter of 2003 instead of the first quarter of 2004. This is an entirely different matter: granting Nextel Partners' request for waiver of Section 54.314 of the Rules does not require any action on behalf of the Wisconsin PSC, but instead requests action solely on the part of this Commission in waiving the strict application of one of its own federal rules. The Commission granted a similar waiver of the state annual certification requirement to the West Virginia Public Service Commission by deeming its untimely filed certification to have been timely filed at an earlier date, without requiring the submission of an amended certification.<sup>17</sup>

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<sup>15</sup> Nextel Partners' Petition for Waiver at 9.

<sup>16</sup> CenturyTel Opposition at 3.

<sup>17</sup> See *West Virginia Public Service Commission Request for Waiver of State Certification Requirements for High Cost Universal Service Support for Rural Carriers*, 16 FCC Rcd 5784 at ¶ 4 (2001).

CenturyTel incorrectly contends that the Commission “virtually has *required*” that requests for waiver of the annual certification requirement in Section 54.314 be filed or supported by a state PSC.<sup>18</sup> In fact, the Commission has *never required* that a state file or support a request for waiver of the annual certification requirement in Section 54.314, and CenturyTel has failed to produce *a single Commission decision* that requires such a showing as a condition precedent to obtaining a rule waiver. Although the Commission did observe in one of the decisions cited by CenturyTel, *Western Wireless Corp. Petition for Waiver of Section 54.314 of the Commission’s Rules and Regulations*, CC Docket No. 96-45, DA 03-2364 (released July 18, 2003) (“*Western Wireless*”) that the carrier’s petition for waiver was supported by the state commission, the Commission did not find that such support from the state commission was a necessary precondition to grant of a waiver, nor did the Commission base its grant of the waiver on the fact of the state’s support. Instead, the Commission stated:

In reaching our decision here, we considered the date of the ETC designation relative to the filing deadline set forth in the Commission’s rules and whether a grant would serve the public interest. As discussed above, we conclude that good cause exists for a waiver in this instance because Western Wireless’s ETC designation occurred after the October 1 certification deadline.

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In sum, because Western Wireless became eligible to receive high-cost support after the October 1, 2001 certification filing deadline, we find that good cause exists to warrant a waiver of section 54.314(d) of the Commission’s rules. This waiver will allow Western Wireless to begin receiving high-cost support as of January 6, 2003, the date Western Wireless received its ETC designation.<sup>19</sup>

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<sup>18</sup> CenturyTel Opposition at 2-3 (emphasis in original).

<sup>19</sup> *Western Wireless* at ¶¶ 9-10.



Moreover, there is no requirement in the Commission's Rules that a state commission provide support to a petition for waiver of Section 54.314. In fact, Section 1.3 of the Commission's Rules allows the Commission ample discretion to waive its rules for good cause shown, on the basis of a filed petition, or on its own motion, without the filing of a petition.

Finally, CenturyTel's position is impractical, because it seeks to place the ultimate discretion for the waiver of a federal rule in the hands of the state utility commission rather than the FCC. The FCC's Rules establish the timing for the state certification of a designated ETC. Section 54.314 requires advance certification, and therefore in this instance it was not possible for the State of Wisconsin to have met the certification deadline due to the timing of Nextel Partners' ETC designation. Nextel Partners thus is requesting that the FCC waive its own rule. No action from the state is needed, nor can a state have authority to waive this rule promulgated by the FCC. Thus, even apart from the fact that the Commission's Rules and case law do not require the state utility's support for grant of a waiver of Section 54.314, there are also practical reasons why the Commission should not require such support as a condition precedent.<sup>20</sup>

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<sup>20</sup> CenturyTel asserts that, aside from Nextel Partners, 10 other carriers were granted ETC designation in Wisconsin on September 20, 2003, and that "[t]here is no reason to expect that the Wisconsin PSC had (or has) any expectation that these carriers would commence receipt of high cost universal service support earlier than January 1, 2004, in compliance with the Commission's rules, or that the Wisconsin PSC intends to seek waivers for any of these carriers." *See* CenturyTel Opposition at 4. However, this is entirely irrelevant, since the instant proceeding is limited to Nextel Partners' waiver request, and concerns neither the "10 other carriers" alluded to by CenturyTel, nor the Wisconsin PSC's intentions or expectations concerning them. Nextel Partners notes that the Wisconsin PSC has not opposed the instant waiver request.

### **III. The Commission Need Not Await the Joint Board's Recommendation's Prior to Ruling on Nextel Partners' Petition for Waiver**

CenturyTel's final effort to derail Nextel Partners' waiver requests by claiming that the Commission should postpone a ruling in this proceeding until the Joint Board has issued its recommendations also has no merit.<sup>21</sup> CenturyTel's argument that grant of the waivers would be "contrary to the national interest" is unsupportable.<sup>22</sup> To the extent that CenturyTel has concerns about the overall designation process for competitive ETCs in rural areas, it should rightfully address those concerns in the rulemaking context. The Commission must address waiver requests as they arise (*see WAIT Radio*). Moreover, grant of the existing waiver requests certainly will not threaten the viability of the USF as CenturyTel implies. Accordingly, it is not reasonable to postpone decision on the instant waiver requests until after the Joint Board's recommendations are issued, because those recommendations address issues of general scope and will not resolve the questions in this proceeding.

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<sup>21</sup> CenturyTel Opposition at 6.

<sup>22</sup> *Id.* at 7. Despite CenturyTel's avowed concern for the increasing the size of the USF to subsidize the universal service offerings of competitive carriers such as Nextel Partners, CenturyTel itself is by no means a stranger to federal subsidies. In fact, CenturyTel's Annual Report indicates that in 2002 alone CenturyTel received \$192.7 Million in USF High Cost support and another \$31.7 Million in intrastate support for its 2.4 Million access lines, constituting more than 11% of CenturyTel's total revenues. Wisconsin is CenturyTel's largest single state, with 490,116 access lines in 2002. USAC's 4<sup>th</sup> Quarter 2003 projections for High Cost support indicate that CenturyTel has 16 Study Area Codes in Wisconsin, and is anticipated to receive federal High Cost subsidies of \$8,520,783 for the 4<sup>th</sup> Quarter alone.

## **CONCLUSION**

For the reasons set forth above, Nextel Partners submits that ample good cause exists for the grant of its Petition, and respectfully requests that the indicated waivers be granted on an expedited basis to allow Nextel Partners to commence receipt of USF subsidies beginning on the date of its designation in the State of Wisconsin.

Respectfully submitted,

**NPCR d/b/a NEXTEL PARTNERS**

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